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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 809

EDWARD McDONELL,
Petitioner,

vs.

MARY GAREE and COSTA B. GAREE,
Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITIONER'S REPLY.

FRANK K. LEMON,
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Reference is had to the same questions presented by the petition and the response, and particularly to respondents' efforts to minimize the fact that they designedly brought to the attention of the trial jury the evidence that petitioner had liability insurance.

Court and counsel discussed the insurance question out of the presence of the jury at the start of the case and respondents' attorney was particularly warned to omit any reference to the proposition of insurance (Tr. 36). Then respondents' attorney asked:

> Q. "Do you remember Mr. Pautz, insurance man at Sabetha?" (Tr. 37)

Then followed a lot of questions and answers concerning Mr. Pautz, and the respondents, and a telegram the petitioner sent to the insurance company. (Tr. 37 and 38)

Then respondent asked some more questions concerning this telegram to the insurance company wherein petitioner referred to "my company". (Tr. 39)

> Q. "In sending this telegram to the insurance company did you tell them you had a serious accident?" (Tr. 40)
>
> Q. "Tell what the conversation was at your home on the 11th of November, 1937."
>
> A. "The substance of the conversation was, he told me he came over for a settlement and I said, what kind of a settlement do you want to make, Mr. Garee."

After objection, the Court said: "You may answer." So the witness said:

> A. " * * * and I told him, you will have to go and talk to the insurance company." (Tr. 40 and 41)

At this point, the attorney for the petitioner called the Court's attention to the fact that notwithstanding the understanding with all parties that the matter was not to be brought out, they constantly ask questions to bring out the thing that they agreed not to bring out (insurance). (Tr. 41 and 42)

Then counsel for petitioner moved to withdraw a juror and continue the cause because the whole examination of the witnesses seemed to be for the primary purpose of

bringing before the jury the question of petitioner's insurance.

Referring to the time of the accident, respondent testified:

Q. "Will you tell what was said there at that time?"

A. "* * * He said: 'I have insurance and they will take care of you all right.' He said: 'It is a good reliable company and they will take care of you.'" (Tr. 46 and 47)

Q. "I will ask you whether or not anyone wrote any names down there on that occasion, * * *."

A. "I did not have any paper or pencil * * * I asked my wife * * * and she said, 'There is a little bit in the glove drawer' and we got that out and wrote his name down and the license number and insurance company." (Tr. 47)

Q. "Now, was there any conversation there between you and Mr. McDonell on that occasion?"

A. "* * * Mr. Pautz came up and wanted to know something about reporting it to the insurance company. * * * I said, 'Well, you should notify the insurance company'." (Tr. 47)

Q. "Did you hear that? Mr. Garee, you will have to speak up. Will you tell what was said there at that time while you and Mr. McDonell and Mr. Pautz and yourself were together?"

A. "Well, about all I can remember is that Mr. Pautz suggested that Mr. McDonell send a telegram to his insurance company after it was over, taking the blame for the wreck." (Tr. 47)

Q. "At whose suggestion did you go up there?"

A. "Well, Mr. McDonell wanted to send a telegram to his insurance company."

Objection sustained. (Tr. 48)

Q. "What did you hear Mr. McDonell say to Mr. Pautz on that occasion, if anything?"

Respondent: A. "Well, he said it was his fault and he wanted to notify his insurance company." (Tr. 48)

Same witness again referred to petitioner's insurance company. (Tr. 48)

Again the witness Costa B. Garee resumed the stand for further direct examination. After a few questions the trial Court said:

> "This is out of the presence of the jury and at the suggestion of counsel for the plaintiff, the Court asks the witness to avoid any reference to the question of insurance in his answers. You watch that, Mr. Garee, and don't refer to the insurance companies." (Tr. 80)

Notwithstanding the admonitions of the Court, counsel for petitioner asked this question on cross-examination:

> Q. "What were you going to do with the paper?"
> A. "Well, it was to take down Mr. McDonell's number, his name and the company he was insured in." (Tr. 82)

The Court instructed the jury that there was no question of insurance in the case for the jury to determine. (Tr. 136)

ARGUMENT.

Notwithstanding the repeated admonitions of Court and counsel, and the frequent objections made by petitioner, both respondent and respondent's attorney persisted in bringing before the jury, repeatedly and unhesitatingly, the fact that petitioner carried liability insurance. If respondent claimed petitioner had admitted that the accident was his fault, that fact could have been well stated without mentioning liability insurance.

While it is true that in one or two instances petitioner's insurance was mentioned when not called for by the question, most of the questions were calculated to elicit the information of petitioner's liability insurance and were unhesitantly repeated, making the intention of respondent and his attorney clearly apparent. While the trial Court approved the verdict and refused to set it aside, the Court admitted that the evidence was quite conflicting and said in part:

> "The jury's verdict comes just as near speaking the truth as it is possible for a court or jury to arrive at the truth through a haze of conflicting testimony." (Tr. 171)

The case at bar both on the law and facts, is similar to *James Stewart & Co.* v. *Newby,* 266 Fed. 287, 295:

> "The last question in the case relates to the testimony as to the employer's protection by liability insurance. It is true that the testimony was ultimately ruled out. This, however, was not done promptly. Complainant's counsel brought the matter to the attention of the jury almost at the beginning of the trial, and by repeated efforts persistently directed the attention of the jury to it, and it was not until the

conclusion of the whole testimony that it was finally excluded. The general rule is that, where inadmissible evidence has been received during a trial, the error is cured by its subsequent withdrawal, or by an instruction of the court to disregard it." (Citation of cases.) "There is this exception to the rule. Where the evidence admitted is so impressive that in the opinion of the appellate court its effect is not removed from the minds of the jury by its subsequent withdrawal, or by the instruction of the court to disregard it, the judgment will be reversed (citation of cases)." " * * * this court must take cognizance of the general recognition among the members of the bar, as well as by the courts, of the harmful effect upon the minds of jurors of such testimony as was here sought to be introduced. The only purpose for which such evidence is presented is to prejudice the jury, and the poison is of such character that, once being injected into the mind, it is difficult of eradication * * *. The authorities are overwhelming that such evidence is inadmissible, that it should be promptly excluded, and that the striking out of the testimony when once admitted does not obviate the necessity for a new trial, if the evidence is so impressive that its effect is not removed by subsequent withdrawal or instruction to disregard."

Also the case of *Brooke* v. *Croson,* 58 Fed. (2d) 885, record shows:

> "That he, the plaintiff, there met and talked with the defendant about the accident; that defendant then and there made statements whereby defendant admitted that the accident resulted from defendant's own fault; that the substance of defendant's statement was, that defendant was due at the store at 7 o'clock; that defendant was 5 minutes late at the time of the accident; that the plaintiff would not suffer any loss as he, the defendant, was fully insured."

In that case the Court admitted the evidence and refused to exclude it. The admission of that evidence was the sole assignment of error on the appeal. The Court said:

> "In our opinion, the ruling in question was erroneous. It is established by the overwhelming weight of authority that as a general rule it is reversible error in the trial of an action for damages for personal injuries suffered in an automobile accident to permit the plaintiff to introduce evidence to show that the defendant is protected by liability insurance against such accidents. It is held that such evidence is not relevant to the issue of negligence, and can have no effect but to induce a verdict based on the fact that an insurance company, and not the defendant, must pay the award."

In the case of *Clark* v. *Hasselquist,* 304 Ill. App. 41, the Court after quoting the questions and answers of the cross-examination of a witness, said in part concerning the witness Buckley who had testified that he had interviewed witnesses in the case for appellant and for his counsel and who was also asked if he represented anyone else. An objection was then made and counsel said:

Q. "Can you answer that question?"

Witness said:

A. "I can answer it."

Upon request witness said:

A. "The Travelers Insurance Company."

Counsel then made a motion to withdraw a juror which was denied, and the Court of review reversing the judgment of the trial Court, said in part:

> "They succeeded in apprising the jury that appellee, the plaintiff in this suit, who was severely injured as a result of this collision while riding as a guest of appellant, was interviewed by a party who was investigating the case for appellant and for his attorneys and for the Travelers Insurance Company and that his purpose in procuring a statement from appellee was to help his employer. The liability in the instant case, if any, is primarily that of appellant and it was improper and prejudicial to deliberately

> bring to the attention of the jury facts from which the jury could only infer that their verdict, if they found the defendant guilty, would be satisfied not by defendant but by someone else. Evidence that defendant carries indemnity insurance protecting him from paying any judgment in an action for negligence is not admissible (citation of cases). It is true as counsel for appellee urge that they had a right to show by questions on cross-examination any and all interest of Buckley in the case which might affect the weight and credit to be given his testimony and that it is proper to show the relationship which exists between a witness and the parties to the suit, but here, after Buckley had testified that he was investigating this case for appellant and his attorneys, counsel for appellee assumed he was investigating the case for some other party not a party to this record and his answer disclosed that other party to be an insurance company."

For other cases to the same effect, reference is made to the cases cited under the first division of our brief.

It is submitted that the evidence of liability insurance that got before the jury in the case at bar, was deliberately placed there by respondent for the purpose of influencing the jury and was not as accidental and voluntary in the matter of disclosure as respondent would seem to indicate.

The issue in this case was, whether the petitioner was guilty of negligence or whether the respondent was guilty of contributory negligence, and it should have been tried upon those issues. Although the question of liability insurance had nothing to do with the issues in the case, it was made the main issue notwithstanding repeated objections by petitioner's attorney and repeated admonitions of the Court. The insurance question was constantly, consistently and repeatedly injected into the case by the re-

spondent. This is not a small and unimportant matter. Not only the parties, but the whole public is interested in fair and impartial trials in our courts of justice and upon the issues presented by the pleadings. As said by this Court upon that subject in the case of *New York Central Railroad Co.* v. *Johnson*, 279 U. S. 310, 318; 73 L. Ed. 706, 710:

> "Respondents urge that the objections were not sufficiently specific to justify a reversal. But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy * * * of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice."

CONCLUSION.

Petitioner respectfully submits that the decision of the Circuit Court of Appeals in the case at bar is in conflict with the decision of other Circuit Courts of Appeal in principle as shown above, and is also inconsistent with the decisions of the Courts of the State of Illinois on the same subject, as shown by the cases cited in the petition. That the evidence of liability insurance put into the case at bar by the respondent, did not tend to prove any material issue in the case and was not innocently volunteered by the witness, and that the judgment of both lower courts be reversed and the cause remanded to the District Court for a new trial.

Respectfully submitted,

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Attorney for Petitioner.